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No. 90-1931

IN THE
Supreme Court of the United States

October Term, 1991

MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT, et al.,

Petitioners,

v.

JOHN DAVIS; WAYNE BROUGHTON; DOUG DURBIN; ED RODIUS; and DON TAYLOR,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the trial court found several incidents were factually related, in denying a pretrial motion to sever the plaintiffs' claims, and the defendants never moved to sever the claims against them and gained substantial advantages from the fact their cases were tried together, must an appellate court consider a motion by the defendants to sever the claims against them which is made for the first time on appeal?

2. Where, at trial, the defendants themselves argued for a "recklessness" standard of municipal liability, and did not object to the trial court's instructions which said the standard is "reckless disregard" or "deliberate indifference," defining both phrases in a manner consistent with City of Canton v. Harris, 489 U.S. 378 (1989), must an appellate court entertain an objection made for the first time on appeal, and reverse the municipal liability verdict?

3. Where state law makes the Sheriff "the chief executive officer" in rural counties, and the "appointing authority" for sheriffs' deputies, and gives him exclusive responsibility for deputies' training and supervision, subject only to civil service review of disciplinary action, is the sheriff a "policymaking official" with regard to the hiring, training and supervision of his deputies?

4. Where a Sheriff gives full police responsibilities to newly-hired deputies, without providing or requiring any training in limits on the use of force, even though he has received warnings and complaints about their propensity to abuse power, has he demonstrated deliberate indifference to the rights and safety of citizens?

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents John Davis, Wayne Broughton, Doug Durbin, Ed Rodius and Don Taylor pray that the Court will not grant this Petition for a writ of certiorari.

JURISDICTION

Respondents do not dispute that the Court has jurisdiction over this case under 28 U.S.C. Section 1254(1).

PARTIES

In addition to the Petitioners Mason County and the Mason County Sheriff's Department, there were several individual defendants and appellants below, who have not joined in the Petition: Pete Cribben, Jack Gardner, Susan Gardner, Garry Ohlde, Doug Quantz, and Ray Sowers.

Mason County's insurer, Scottsdale Insurance Company, has a separate interest in this case, as it affects the pending lawsuit against the lawyers it retained to represent the defendants at trial. Rush, Hannula & Harkins v. Scottsdale Insurance Co., Pierce County Cause No. 89 2 01084 0.

STATE STATUTES INVOLVED

This case involves several Washington statutes, in addition to those set out in the Petitioners' Appendix, including RCW 36.28.010, 36.28.020, and 41.14.020, which are set out in Appendix A to this Brief.

STATEMENT OF THE CASE

The Petition does not fairly portray the facts underlying the jury's verdict and the Court of Appeals' decision below, regarding either the individual civil rights violations, or the Sheriff's Department policies that caused them.

1. The Civil Rights Violations

The Petition's summary descriptions of the incidents themselves are drawn from the testimony of the individual defendant deputies. Yet, as the District Court observed in its Order Denying A New Trial, "a disbelief of the individual defendants' testimony is inherent in the jury's verdict."

The Court of Appeals' summary of the incidents accurately reflects what the weight of the evidence showed, and the jury found. For the Court's convenience, we will repeat it here.

A. The Durbin Incident

Early on the morning of June 29, 1985 as Doug Durbin returned home from a local tavern, Deputy Ray Sowers followed him and waited outside of Durbin's home. Deputy Tom Furrer later arrived as backup. Sowers, flicking an electric stun gun on and off, ordered Durbin out of his house. Durbin, who complied, was arrested for drunk driving. After taking one step toward his house, the two deputies tackled Durbin and threw him to the ground. Though Durbin never attempted to resist, Sowers began to beat him on the back of his head with his fist. In the patrol car on the way to the jail Sowers slammed on the brakes, causing Durbin, who was handcuffed and thus defenseless, to smash into the screen with his face.[1]

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[1]Mr. Durbin's description of these events was confirmed by a report by Deputy Furrer which said that "Sowers was hitting Durbin about the head several times with his fist" while "Durbin ... was not or even attempting to resist" but "lying there ... and was not even talking." (On his Sergeant's instructions, Furrer wrote and filed a second report which left out this language.) After Deputy Furrer's original report became public, Sowers was given a reprimand which said he "use[d] too much physical force" and "used physical force on Mr. Durbin after he was under officer's control." Sowers also later admitted to a polygraph examiner for a subsequent employer that he had hit Mr. Durbin. He denied it in his testimony at trial, however.

Durbin was charged with driving while intoxicated [although his "breathalyzer test ... read .05, well below the legal definition of intoxication"], resisting arrest and obstructing an officer. Yet after Durbin signed a "Release and Satisfaction" against Mason County, the charges against him were dismissed.

B. The Taylor Incident

Deputy Doug Quantz pulled over Don Taylor as he was driving through Shelton on the afternoon of July 20, 1985, allegedly for driving too fast. Quantz ordered Taylor to spread-eagle against the patrol vehicle and proceeded to conduct a pat-down search. Under the guise of this search, Quantz twisted the skin on Taylor's arms and legs, struck him on the sides, hit him in the testicles, and slammed him against the side of the patrol car. Later, in the jail elevator, Quantz hit Taylor in the kidneys with his fist.[2]

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[2]Deputy Quantz's treatment of Mr. Taylor (who was himself a former police officer) was attested to by Mr. Taylor's wife, Nancy, and an independent witness who observed it from the yard of a nearby house. Based on the statements of the "approximately six" witnesses who gave a similar account, Mason County Prosecuting Attorney Gary Burleson testified that he decided to drop the resisting and obstructing charges even before Mr. Taylor signed a covenant not to sue.

After signing a "Partial Covenant Not to Sue," promising not to bring charges against Mason County, the charges against Taylor, including reckless driving, obstructing an officer, and resisting arrest, were dropped.

C. The Davis/Broughton Incident

John Davis and his fifteen year-old nephew, Wayne Broughton, were driving a loaded hay wagon drawn by a team of four horses on the afternoon of July 28, 1985. Because some cars were slowed behind the wagon, Deputy Jack Gardner came alongside the wagon in his patrol vehicle and, using his loudspeaker, ordered Davis to pull over. Davis lost control over the horses, who had been frightened by the noise of the loudspeaker. Gardner pulled in front of the wagon, took out his gun, pointed it at Davis and Broughton and threatened to shoot if they did not stop. As Davis got down from the wagon to attend to his horses, Gardner beat him on the legs with his nightstick and struck him on the head. He then knocked him down to the ground and continued to beat him. After Deputies Pete Cribben and Garry Ohlde arrived at the scene, all three hit him, kicked him, and shocked him with an electric stun gun. According to one witness, Davis "looked like he had been dipped in a bucket of blood" after the officers finished beating him.

Deputy Gardner's wife, who had been riding with him as a passenger and who was not an officer, ordered Broughton down from the wagon, and then took him by the arm and put him in the patrol car. After being questioned for an hour, Broughton was released.[3]

Davis was arrested and charged with felony assault, resisting arrest and obstructing an officer. The misdemeanor charges were dismissed, and a jury, which found that Davis was acting in self-defense, acquitted him of the felony charge.

D. The Rodius Incident

When Deputy Ray Sowers observed four young people talking between a car and a truck on the evening of March 15, 1986, he pulled over both vehicles. Sowers ordered Ed Rodius, a passenger in the truck, into the patrol car after he asked why they had been stopped. When Rodius refused to comply, Sowers jumped on Rodius, choked him, pulled on his hair, and then threw him to the

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[3]The assault on Mr. Davis and the arrest of Wayne Broughton was confirmed by several civilian witnesses whose cars were forced to stop by the collision between the hay wagon and Deputy Gardner's vehicle. Physical evidence supported these witnesses--particularly, Mr. Davis' injuries, which included head wounds that required over 115 stitches to close, and permanent brain damage, although the defendants denied inflicting any substantial blows to his head.

> ground and rubbed his face on the gravel of the parking lot.[4]
>
> Rodius was arrested and charged with possession of alcohol as a minor, purchasing liquor, and resisting arrest. Rodius was tried twice on the resisting arrest charge. The first trial resulted in a hung jury, and the second was declared a mistrial after the prosecution violated a motion in limine by referring to the case at bar in front of the jury. The Mason County Prosecutor's office eventually dismissed the charges.

Pet. App. A-14-19.

The Petitioners do not and cannot suggest that the evidence does not support this factual summary; there was no dispute about it among the majority and dissenting opinions below. There can be no question that, upon those facts, the jury could properly reach the judgments it did.

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[4]Mr. Rodius' description of Deputy Sowers' actions was corroborated by the other young people at the scene of his arrest and the clerk of a nearby convenience store.

2. The Sheriff's Policies

The Petition also ignores the record in its attempt to portray these events as "unrelated." Petition 8. Plaintiffs alleged and proved, and the jury found, that all of these incidents resulted from the policies of former Mason County Sheriff Nat Stairs.

All the incidents which gave rise to this case involved deputies hired in 1984 and 1985, after an increase in state funding. The hiring was done through a two stage process: a basic civil service screening, followed by a final selection by Sheriff Stairs himself.

Plaintiffs' expert Donald Van Blaricom testified that under the Stairs administration the procedures for informing the Sheriff's selection became "nonexistent or superfluous. There was no real effort to endeavor to learn what the background of these officers were."

The evidence overwhelmingly supported this conclusion.

Defendants Sowers, Quantz, and Cribben all had prior law enforcement related jobs--as an undercover informant, a prison guard, and a private security guard, respectively. However, none of their records from their prior employers were obtained during the hiring process. All three of them were examined by a police psychologist, Dr. John Berberich. As to all three Dr. Berberich made special recommendations that (if they were hired) special care be taken in their training, because of apparent personality problems. That recommendation was ignored; all three were given full patrol responsibilities, on their own, without attending the basic

police academy or even completing a field training program.[5]

Defendant Jack Gardner was accepted as a "lateral hire" from another department. Gardner had difficulties in both his prior police jobs. He was forced to resign from the Police Department of the City of Sumner, Washington, to avoid prosecution for theft--after the last of the four internal investigations he was subjected to there. Although the Mason County Sheriff's Department was alerted to this, Gardner's records were never obtained and the Sumner Police Chief was never contacted before Gardner was hired and

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[5]The statement in the Petition that "all the officers, except Sowers, were trained at the State police academy before the incidents occurred" (Pet. 7) is false. As the Court of Appeals noted, neither Cribben, Sowers nor Quantz had been to the academy at the time of the incidents in which they were involved. See Pet. App. A-40-41.

put out on patrol without any further training.

Training under the Stairs administration was wholly deficient. As noted above, newly hired deputies, including three of the defendants, were sent out on patrol without ever having attended the State police academy. The Department fashioned a paper "field training program" which was adequate on its face but was never followed. One of the Department's two original "field training officers"--both of whom resigned the position--called the field training program "a joke." As plaintiffs' expert testified: "they totally disregarded not only the industry standards, but their own policies and standards, and they sent officers out on the street to perform police services without any training whatsoever."

When the deputies' behavior resulted in citizen complaints, reports of their misconduct were suppressed or ignored. Sheriff Stairs announced publicly that only complaints sworn under oath would trigger an internal investigation. Although this deterred citizen complainants, written complaints still were made. But even when they were brought directly to the Sheriff himself, nothing was done.

The testimony at the trial below revealed this pattern: "Cover charges" of obstruction, resisting arrest, and the like, would be filed against persons subjected to police brutality. In many instances, these charges were then dropped in exchange for covenants not to sue the County. No internal investigation was ever conducted, despite

repeated complaints,[6] until public concern grew so great that a large community meeting was called and petitions were circulated demanding an end to police harassment.

After that meeting, the Sheriff publicly admitted he had failed to properly train and supervise his patrol officers, and claimed to have disciplined Ray Sowers for his treatment of Doug Durbin. The discipline turned out to be a sham.[7]

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[6]For example, the testimony revealed at least five incidents during Deputy Sowers' nine months on the job prior to the Durbin incident in which his conduct had resulted in citizen complaints, potential claims against the County, and/or the dismissal of criminal charges. No action was taken on any of them.

[7]Sowers was supposed to have received a "suspension". In fact, he only lost a few days of vacation time. In addition, Sowers' discipline was supposed to include counseling by Dr. Berberich. It never did; Sowers testified below that his superiors told him to ignore that part of the "disciplinary" order.

Two months after the Sheriff's announcement, a jury acquitted plaintiff John Davis of assaulting Deputy Gardner, and made a special finding (pursuant to Washington statute awarding attorneys fees) that Mr. Davis was acting in lawful self-defense. The Sheriff's Department took no action against Deputy Gardner. Two months later, Ray Sowers falsely arrested and beat up Ed Rodius. Shortly after that, in July, 1986, this lawsuit was filed.[8] In November, 1986, Mason County voters turned Sheriff Stairs out of office, electing a new Sheriff in his place.

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[8]The Complaint named as defendants Sheriff Stairs, as well as the County and the individual deputies. It also included two plaintiffs, in addition to those whose cases went on to trial: Ken Solene, and his son Shane.

The Solenes' claims for false arrest (against the County and Deputy Cribben) settled before trial. Sheriff Stairs died shortly after he left office, and the claim against his estate was voluntarily dismissed.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY REFUSED TO ORDER A NEW TRIAL ON THE BASIS OF A QUESTIONABLE SEVERANCE ARGUMENT WHICH WAS NEVER MADE IN THE DISTRICT COURT.

The Court of Appeals unanimously rejected two different severance arguments--one because it sought relief which was qualitatively different from what the defendants requested in the trial court, and the other because it found the trial judge acted within his discretion. See Pet. App. A-21-24. In this Court, Petitioners appear to renew only the first of these arguments, which they say the Court of Appeals "elevated form over substance in refusing to review ...." Petition 13.

Petitioners cite no authority from this Court or another federal Circuit which is inconsistent with the Court of Appeals' treatment of this matter. Nor do they suggest any significance it could have beyond this case.

We submit that, not only was the Court of Appeals' decision on this wholly case-specific, it was unquestionably correct. To make that clear requires some review of the procedural background against which its decision was made.

1. The Pretrial Motion to Sever the Plaintiffs' Claims.

At the start of this case, there were seven plaintiffs. Two of them, Ken Solene and his son, Shane, made a claim based on Mr. Solene's illegal arrests by Pete Cribben and another deputy in January, 1985. Mason County had a different insurance carrier at that time, so separate defense counsel was hired to represent Deputy Cribben and the County on the Solene claim.

Several months before trial, the two defense counsel jointly moved for an "order severing and bifurcating the claims of the plaintiffs herein from each other," citing FRCP 21 and 42(b). Pet.

App. F-3 (emphasis added). The supporting arguments were explicit and consistent on the result sought, which would have freed defense counsel in the Solene case from a joint trial involving the several other plaintiffs' claims.[9]

The District Court denied the motion. The Solene case settled, and the severance request was never renewed. The remaining claims went to a joint trial, with all the defendants represented by a single law firm.

The defense obtained substantial advantages from the fact the cases against them were tried together. For one thing, it greatly reduced the

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[9] See Defendants' Memo. Supporting Motion to Sever, Pet. App. G-7 ("each plaintiff's claim should be separated into separate trials"); id. at G-10 ("[t]he claim of each plaintiff should be separated"); id. at G-13 ("separate trials of the individual plaintiffs' claims will avoid the prejudice that would necessarily result from a trial in which all plaintiffs' differing and inconsistent claims would present to a jury"). (Emphasis added.)

required trial time and expenses. As it was, the case took 22 trial days. Separate trials would have taken several times as long, with an attendant increase in defense counsel's fees and expenses, and the defendants' exposure for plaintiffs' attorneys' fees under 42 U.S.C. § 1988.

The joinder of the cases also provided the defendants with important tactical advantages during trial. To rebut the claims against the County relating to hiring and supervision, defense counsel was able to present the jury with favorable information from the individual defendants' personnel files, a survey purporting to show that they rarely resorted to physical force,[10] and even expert testimony that (if their

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[10]This survey turned out to have left out a number of the incidents involving the use of force by these deputies, which were the subject of testimony and documents admitted at trial.

versions were believed) the defendant deputies had acted properly in each of the incidents which gave rise to this case. None of this would have been admissible in trials against the individual deputies alone.

The defendants apparently decided these advantages outweighed the disadvantages of a joint trial. At any rate, after the Solene case settled, they never again suggested to the District Court that the trials should be severed.

2. The Appellate Argument to Sever the Defendants.

When the case reached the Court of Appeals, new defense counsel made a wholly different severance argument: that the defendants were misjoined under FRCP 20(a). They press the same claim here. See Petition 10-11. The Court of Appeals rejected this argument because it was not made in the District Court. Pet. App. A-23.

The Petitioners contend that, by so ruling, the Court of Appeals "elevated form over substance." Petition 13. But the distinction between a request to sever plaintiffs and a request to sever defendants,[11] is no mere matter of form. If granted, these proposals would produce completely different results. The motion made in District Court asked for seven trials, one for each plaintiff (including the Solenes); the County and the Sheriff would have been involved in all seven trials, the deputies (except Cribben and

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[11]Misjoinder under FRCP 20(a) was never claimed in the defendants' pretrial motions or supporting arguments. Had it been, it would have availed the defendants little: for each individual defendant and the County were sued jointly for "the same transaction or occurrence," and the different individuals were sued for a "series of transactions or occurrences," and there were innumerable "question[s] of law or fact common to all defendants." The joinder of these cases was thus unquestionably proper. See United States v. Mississippi, 380 U.S. 128, 142-43 (1965).

Sowers) would each have been involved in only one. The argument made on appeal would have produced nine trials: all the plaintiffs (except Mr. Taylor) would have been jointly involved in two joint trials (one against the County and one against the Sheriff), in addition to one or more separate trials against the individual deputies. To suggest those results are equivalent ignores reality.

As the Court of Appeals noted, the severance of plaintiffs' claims the defendants requested in the District Court would not have solved the problem they now emphasize:

> Even if each plaintiff had a separate trial, evidence of a pattern of misconduct would still have been admitted because each plaintiff presented a claim against at least one defendant and against the County. Since defendants requested severance of the plaintiff's claims, the court below did not abuse its discretion in rejecting the motion.

Pet. App. A-23-24 (original emphasis).

Instead of granting a severance that would not solve this problem, the District Court gave careful limiting instructions to the jury, whenever evidence came in against one defendant that could not properly be considered against another, and at the end of the case.[12] This was fully consistent with the Rules and the law of every Circuit.

> Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966).

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[12]There were at least seven instructions given during the course of trial, and at the submission of the case, clarifying such issues for the jury. The Petitioners have never challenged the sufficiency of those instructions.

The use of such limiting instructions is generally preferred to the more drastic remedy of severance. See, e.g., State of New York v. Hendrickson Brothers, Inc., 840 F.2d 1065, 1082-83 (2nd Cir. 1988).

There was no unfairness here. There were both advantages and disadvantages to conducting the trial jointly, for both sides. The District Court considered and properly rejected the only request made to it to separate the cases for trial. In the Ninth Circuit, and every other Circuit, such decisions are reviewed for abuse of discretion.[13] It could hardly be otherwise. Such questions involve myriad case-specific considerations only trial judges can fully assess and balance.

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[13]See Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 848 (9th Cir. 1987). Accord Gonzalez-Marin v. Equitable Life Assur. Soc., 845 F.2d 1140, 1145 (1st Cir. 1988); Idzojtic v. Pennsylvania Railroad Co., 456 F.2d 1228, 1230 (3rd Cir. 1972); Oman v. Johns-Manville Corp., 764 F.2d 224, 232 (4th Cir. 1985), cert. denied 474 U.S. 970 (1985); Jolley v. Welch, 904 F.2d 988, 994 (5th Cir. 1990); Easton v. City of Boulder, Colo., 776 F.2d 1441, 1447 (10th Cir. 1985), cert. denied 479 U.S. 816 (1986); Hendrix v. Raybestos-Manhatten, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985).

To permit a losing party to claim, on appeal, that a trial should have been configured differently than it proposed to the trial court, would eviscerate the trial judge's discretion and inject an intolerable uncertainty into all types of complex federal trials. The Court of Appeals' refusal to do that was unquestionably correct, and presents no issue warranting this Court's review.

II. THE DISTRICT COURT'S JURY INSTRUCTIONS ON MUNICIPAL LIABILITY --WHICH WERE NOT OBJECTED TO-- CORRECTLY ANTICIPATED THE STANDARD OF CITY OF CANTON V. HARRIS, 489 U.S. 378 (1989).

At the time of this trial in early 1988, there was an unresolved division among the Circuits regarding the standard by which a municipality could be held liable for improperly hiring, training or supervising its police officers. The standard in the Ninth Circuit was gross negligence. Hirst v. Gertzen, 676 F.2d 1252, 1256 (9th Cir. 1982).

Throughout the trial, defense counsel variously argued that gross negligence, recklessness, or deliberate indifference was the correct municipal liability standard.[14] The District Court instructed the jury on the higher of these standards: "reckless disregard for, or a deliberate indifference to, the rights of citizens." Pet. App. I-12. It defined these terms as follows:

> "Deliberate indifference" is an act or failure to act that is done with a callous indifference or thoughtless disregard of the consequences of one's action or failure to act on the rights of others.

Instruction No. 42.

> A person acts recklessly or with reckless disregard for the consequences when he disregards a substantial risk that a wrongful act may occur of which he is aware, or which is so

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[14] See Tr. 2471 ("recklessness or gross negligence"); Tr. 2486 ("at least gross negligence and probably recklessness"); Tr. 4079 ("gross negligence or deliberate indifference"); Def.'s Trial Brief at 27 ("gross negligence" [original emphasis]).

> obvious that he must have been aware of it, and his disregard of that risk is a gross deviation from the conduct that a reasonable person would exercise in the same situation.

Instruction No. 43, Pet. App. I-16. The defense took no exceptions to any of this language.

A year later, this Court resolved the division among the Circuits on this question by holding that municipal liability exists when a constitutional violation results from "deliberate indifference to the constitutional rights of" citizens, and rejecting the lesser standard of "gross negligence". City of Canton v. Harris, 489 U.S. at 388 n.7. The Court did not specifically address the validity of the "reckless disregard" standard the jury was alternatively given in this case.

If it were necessary to decide the issue here, we believe the Court would hold there is no significant distinction

between the phrases "deliberate indifference" and "reckless disregard." The dissenting opinion of Justice O'Connor in City of Springfield v. Kibbe, 480 U.S. 257 (1987)--which was a key of the foundation on which the majority built in City of Canton, see 489 U.S. at 385--used these terms interchangeably:

> In my view the 'inadequacy' of police training may serve as a basis for §1983 liability only where the failure to train amounts to a reckless disregard for or a deliberate indifference to the rights of persons within the city's domain.

480 U.S. at 268-69 (emphasis added). Accordingly, as Petitioners point out, the Circuits have generally held that "recklessness" is the equivalent of "deliberate indifference,"[15] as that

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[15]See, e.g., Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990); Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990); D.T. v. Independent School District No. 16, 894 F.2d 1176, 1192-94 (10th Cir.), cert. denied 111 S.Ct. 213 (1990); Clipper v. Takoma Park, Maryland, 876 F.2d 17, 20-21 (4th Cir. 1989).

phrase is used in City of Canton. This case does not turn on whether those courts are correct, however, for two reasons.

The first is the definition of "recklessness" given to the jury in this case. The jury was instructed that "reckless disregard" is disregard of "a substantial risk that a wrongful act may occur ... of which [the actor] is aware" which, in addition, is "a gross deviation" from reasonable conduct. Instruction No. 43, Pet. App. I-16. In the immediately preceding instruction, "deliberate indifference" was defined to the jury as "an act or failure to act that is done with callous indifference or thoughtless disregard of the consequences...." Only the most sophistic analyst could find a distinction between those definitions. Both captured the essence of the standard approved in City of Canton:

> that in light of the duties assigned to specific officers or employees the need for more or different training [was] ... so obvious, and the inadequacy so likely to result in a violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

489 U.S. at 390.[16] Even if an unadorned instruction using the word "recklessness" would contravene City of Canton, these instructions did not.

The second reason that this case does not present this broader issue is the defendants' lack of objection to any of this language. In the Ninth Circuit, as elsewhere, the failure to object to a jury instruction waives the issue on

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[16]Plaintiffs' counsel made this clear in argument to the jury. "[W]e're talking about sheriff's decisions here regarding hiring, training, and supervision that was reckless, not just negligent. We have a higher standard; we have to show reckless. We have to show that he [sic] was a known danger that was ignored, and if that proximately caused the injuries to these plaintiffs, then the county is liable for the civil rights violation as well."

appeal.[17] Although the Ninth Circuit allows an exception where a "solid wall" of Circuit authority would make objection futile, plainly that was not the situation on this issue at the time of this trial, as the Court of Appeals correctly concluded. See Pet. App. A-33-34. Indeed, the existence of a longstanding split in authority on this question was the reason the Court undertook to answer it in City of Canton. 489 U.S. at 388 n.7. There was no reason the defendants could not have made this argument at the trial in 1988. Cf. Engle v. Isaac, 456 U.S. 107, 130-131 (1982).

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[17] Palmer v. Hoffman, 318 U.S. 109, 119 (1943); Goeken v. Kay, 751 F.2d 469, 474 (1st Cir. 1985); Levitt v. Desert Place, Inc., 601 F.2d 684, 686 (2nd Cir. 1979); Sims v. Mulcahy, 902 F.2d 524, 535-36 (7th Cir. 1990); Wilson v. Crouse-Hinds Co., 556 F.2d 870, 875 (8th Cir. 1977) (en banc), cert. denied 434 U.S. 968 (1977); Gilbert v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986).

The District Court gave the defense the benefit of the doubt that existed on this issue at the time, and correctly anticipated this turn in the law. The defendants found nothing in that to complain about at the time, and the Court of Appeals correctly rejected their belated, technical complaint on appeal.

III. THE COURT OF APPEALS CORRECTLY DECIDED THAT UNDER WASHINGTON LAW THE SHERIFF OF A RURAL COUNTY IS THE POLICYMAKER CONTROLLING THE TRAINING OF HIS DEPUTIES.

One of plaintiffs' theories of municipal liability was that Mason County's official policies, as embodied in the actions and official statements of Sheriff Stairs, caused the plaintiffs' rights to be violated.[18]

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[18]Plaintiffs separately showed an unconstitutional municipal policy through the alternative means of establishing "the existence of a widespread practice that, although not authorized by written law or express municipal policy," is "so permanent and well-settled as to constitute a 'custom or usage' with the force of law." City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

The law governing such claims is well settled. Although municipalities are not vicariously liable for civil rights violations by most of their agents, liability may flow from the acts of "a lawmaker[] ... whose edicts or acts may fairly be said to represent official policy." Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). "The identification of policymaking officials is a question of state law." City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988).

Under Washington law, in smaller counties like Mason County,[19] "[t]he sheriff is the chief executive officer and conservator of the peace of the

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[19]Washington Constitution Article 11, Section 4 allows any county to adopt an alternative "Home Rule" form of government. In larger Washington counties the home rule charters generally make a County Executive the chief executive officer. E.g. King County Charter Article 3, §§ 310, 320. Smaller Washington counties such as Mason County have no similar executive officers.

county." RCW 36.28.010.[20] Washington sheriffs are constitutional, elected officials. Wash. Const. Art. 11, § 5. The sheriff is the "appointing authority," who selects deputies from lists of the three highest scoring applicants on civil service tests. RCW 41.14.060(7). The sheriff assigns duties and determines what training newly hired deputies receive before they "go out." Tr. 2024.[21] During the first year of employment, deputies may be terminated by the Sheriff at will. RCW 41.14.130.

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[20]Prior to 1965, this statute closed with a proviso that "[t]he county is not responsible for the acts of the sheriff." Former RCW 36.28.010 (1964). This proviso was removed in 1965. Washington Laws 1965, Ch. 2092 §1; see RCW 36.28.010 (1989 Supp.).

[21]RCW 43.010.200 requires that all police officers complete basic training at the state police academy within 15 months of the date they are hired. The statute contains no enforcement mechanism. It was violated by the Stairs Administration in the case of Ray Sowers, who attended the academy late, and Undersheriff Bud Hays, who never attended at all.

After one year, the sheriff's disciplinary actions which involve termination or suspension are subject to review by the county Civil Service Commission. RCW 41.14.120.

Washington statutes recognize that the power to deputize gives sheriffs the power to control their deputies. RCW 36.28.020. By statute and case law, they are liable on their bond for their deputies' misconduct. RCW 36.28.020; see Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918). As the Mason County Sheriff's Department's Policy Manual states:

> The Sheriff is the Chief Executive of Mason County and of the Department. Upon him rests the final responsibility for determining policy. In his capacity as Chief Administrator of the department, the Sheriff maintains control and governs activity through executive officers who act in the advisory capacity in matters of general policy and procedures. The Sheriff shall have the power and authority to discipline employees of the department for non-compliance with rules, regulations, procedures and

> lawful orders issued by him or any superior officer. He may delegate whatever authority he deems necessary to ensure the maintenance of discipline within the department.

Mason County Sheriff's Office Policy Manual Section 4.01.01 (12/28/87). The testimony at trial bore this out: on issues regarding the hiring, training and supervision of their deputies, Sheriff Stairs answered to no other official or governmental body, except the electorate.

District Judge Robert Bryan was intimately familiar with this aspect of Washington law from his 17 years on the Superior Court bench in Kitsap County, Mason County's northerly neighbor. After reviewing these statutes and City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), Judge Bryan instructed the jury as follows:

> The Sheriff of Mason County is the chief law enforcement officer of that county and a policy-making official for the Mason County Sheriff's Office.

Instruction No. 41, Pet. App. I-15. Judge Bryan's reference to the Sheriff as "the chief law enforcement officer" was derived from a defense proposed instruction which tracked the language of RCW 36.28.010, and said that the Sheriff was the "chief executive officer" of the County. Def. Proposed Instr. No. 40, Appendix B. However, the defendants objected to the statement that the Sheriff is "a policy making official," and to the court's refusal to give the jury their proposed instructions quoting Washington's civil service statutes.[22]

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[22]Defense counsel never directly argued at trial that these statutes made the Civil Service Commission the policy-making body for the Sheriffs' Department, as Petitioners apparently do now; he simply objected to so characterizing the Sheriff.

We submit those objections were properly overruled. As the statutes and policy statements set forth above make clear, the Sheriff has the real authority over his deputies. The county Civil Service Commission[23]--which is made up of three unpaid citizen appointees, RCW 41.14.030--has only two essential functions affecting sheriffs' deputies. It administers standardized Civil Service examinations to job applicants, and certifies to the Sheriff (the "appointing authority") the top three qualifiers. RCW 41.14.060(6). It also can investigate "whether the removal, suspension, demotion, or discharge" of a "person in the classified civil service" --which includes sheriffs' deputies employed more than one year--"was made in

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[23]Petitioner's reference to "The State Civil Service Commission" (Pet. ii, 19) is a misprint. Although there is a State Personnel Board in Washington State, it deals only with state employees. RCW 41.06.010; RCW 41.06.110.

good faith for cause." RCW 41.14.120. Neither of these functions approaches "policymaking" under Praprotnik.

The Commission's hiring function is narrowly circumscribed. Its tests are standardized and "practical." RCW 41.14.060 (2), (6). Their results are not binding: three names, not one, are certified by the Commission, "to give the sheriff a greater choice in appointing successful examinees." Fezzey v. Dodge, 33 Wn.App. 247, 251 n.1, 653 P.2d 1359 (1982). Moreover, "[t]o enable ... [the Sheriff] to exercise a greater degree of choice in the filling of positions," appointments are provisional for one year,[24] during which the sheriff "may terminate the employment of the person appointed" if he "deems such person unfit or unsatisfactory ...." RCW 41.14.130.

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[24]All but one of the incidents in this lawsuit involved deputies who had been employed for less than a year.

The Commission's role in decisions to dismiss classified employees is similarly secondary. The commissioners act in a quasi judicial, reviewing role. "'[T]hey are not given the power of either actual appointment or removal.'" In re Smith, 30 Wn.App. 943, 948, 639 P.2d 779 (1982), quoting Easson v. Seattle, 32 Wash. 405, 413, 73 Pac. 496 (1903).

> [A] civil service commission operating pursuant to RCW 41.14.120 must confine its inquiry to those reasons set forth by the appointing power. It may investigate those reasons but may not substitute reasons of its own ....

Ibid. Again, "the appointing power" is the Sheriff. RCW 41.14.020(2).

Petitioners overstate the cases by which they seek to portray the Civil Service Commission as a policymaking body. Fezzey v. Dodge, supra, arose under a previous statutory regime, which required the Sheriff to hire the single applicant certified to him by the

Commission. 33 Wn.App. at 251. The court in Fezzey did not hold even that older statute "preempt[ed] the county sheriff's discretion in personnel matters," as Petitioners' argue (Petition 17); what it said there was this:

> This statute affords applicants the fundamental right to fair competition and fair consideration for employment opportunities.... Implicit in the statutory scheme is the legislative intent to circumscribe the county sheriff's previously unbridled discretion in personnel matters.

33 Wn.App. at 250 (emphasis added, citation omitted). Clallam County Deputy Sheriff's Guild v. Commissioners, 92 Wn.2d 844, 601 P.2d 943 (1979), provides Petitioners even less support: all it held was that the state statute was "intended to preempt the coverage by county personnel systems of deputy sheriffs' selection, promotion and termination." 92 Wn.2d at 851. It said nothing about the division of responsibility among the County

officials--except to note that the power to set deputies' salaries, which was at issue in that case, "resides in the 'appointing power,' i.e., the county sheriff, with the consent of the board of county commissioners."[25] 92 Wn.2d 850.

Neither these nor any other Washington case law supports Petitioners' claim that the civil service laws have taken away from the Sheriff the power and duty to set policy for and about his deputies. Acceptance of that claim would work a radical transformation in county government and sheriff's departments throughout Washington. Although a broad reading of the catchall language of RCW 41.14.060(1), quoted by Judge Wallace in his dissent below (Pet. App. A-75), would suggest the Commission's rule making

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[25]The Board of County Commissioners is the legislative body in smaller counties in Washington State. RCW 36.32.005. It is wholly separate from the Civil Service Commission.

powers could be extended to reach the training and supervision of sheriff's deputies, no Washington case has ever recognized such authority--and so far as we know no county Civil Service Commission has ever claimed it. The law and custom in the State of Washington has always located such powers in the Sheriff.

We thus submit that the District Court and the Court of Appeals majority correctly applied Praprotnik to this particular area of this state's law. Judge Wallace's dissent shows that the point can be argued; but the District Court's instructions are consistent with the weight of state authority, and the common understanding, including that of officials in Mason County itself.[26]

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[26]The testimony below showed that all the relevant decisions regarding hiring, training, and supervision of Mason County deputies were personally made by Sheriff Nat Stairs. See, e.g., Tr. 1978, 2020-2026, 2037.

Even if the District Court was wrong on this, however, there is nothing here that calls for this Court's review. There was no disagreement below about what Pembaur and Praprotnik hold, or what the scope of municipal civil rights liability should be. The dispute was about some very specific provisions of the law of one state. The Court ordinarily defers to lower courts on such matters, because of their greater familiarity with local practice. Maynard v. Cartwright, 486 U.S. 356, 360 (1988); Edwards v. Aquillard, 482 U.S. 578, 609 (1987) (concurring opinion of Justice White). There is no reason to do otherwise here; and surely, the interpretation of one state's law is not an issue of sufficient national importance to justify this Court's attention.

IV. ON THE EVIDENCE IN THIS CASE, THE COURT OF APPEALS WAS JUSTIFIED IN ITS ALTERNATE CONCLUSION THAT MASON COUNTY'S FAILURE TO TRAIN ITS DEPUTIES IN THE LIMITS ON THE USE OF FORCE SHOWED DELIBERATE INDIFFERENCE TO CITIZENS' SAFETY.

Petitioners' last argument is difficult to respond to, because it is riddled with misrepresentations and exaggerations which undermine every one of its its factual predicates.

First, Petitioners say "[t]he official county policy, which the court refused to give as a jury instruction, is that officers use only reasonable force." Petition 19. The proposed jury instruction they point to is set out at Pet. App. I-10. It quotes from the policy manual of a previous Mason County Sheriff;[27] Sheriff Stairs never issued

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[27]As the instruction states, this part of the former manual does not use the term "reasonable" force, but says "Deputies will not use more force than is necessary to make an arrest ...." Pet. App. I-10.

any written policy on this subject.[28] The old manual was marked, but never offered into evidence at trial; and no witness testified about its "policy" statement. The defendants did not object to the District Court's refusal to give the instruction based on it at trial, and did not claim that as error in the appeal below.

Second, Petitioners say "Mason County followed state law in sending all officers to the State Police Academy" (Petition 19), harkening back to their earlier statement that "[a]ll the officers, except Sowers, were trained at the State Police Academy before the incidents occured" (Petition 7). As the

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[28]The only direct evidence of Sheriff Stairs' policy regarding the use of force was this statement he made at the public meeting following the Davis incident: "The policy on firearms is when deemed necessary. However, now, let me explain this. When you pull a weapon, the policy says, you will make out a report, and it better be valid. In other words, it better hold up in court."

Court of Appeals noted, three of the deputies--Sowers, Cribben and Quantz--had not attended the Academy, or received any real police training, at the time of the incidents here. Pet. App. 40-41.[29] Sowers finally went to the Academy, a month later than the latest the law allowed. Neither Sheriff Stairs nor Undersheriff Hays ever went to the Academy at all. Pet. App. 38. As to Hays, that violated the statute; the Sheriff was exempt from it.

Third, Petitioners say "the Civil Service Commission is responsible for hiring and firing decisions." Petition 20. Even the most extreme reading of the statutes and caselaw governing the civil

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[29]Petitioners' statement is not literally accurate as to Jack Gardner, either. Gardner was not trained by Mason County; he went to the Academy while employed at the Sumner police department--from which he was forced to resign, after four internal investigations into his conduct there. Mason County did not retrain him, but put him in a supervisory role.

service process (discussed in Point III above) do not support this. As noted there, the Commission's role in these processes is limited to screening lists of job applicants for the Sheriff and reviewing his decisions to fire deputies who have been employed more than a year. See pages 39-40, above.

Fourth, the Petitioners say "the Ninth Circuit held, as a matter of law, that "'the County was negligent as a matter of law for failing to train in the constitutional limits of the use of force.'" Petition 20 (emphasis theirs). Their purported quotation appears nowhere in the Court of Appeals' opinion. What the Court of Appeals said was this:

> The jury instructions on this issue were nevertheless harmless because Mason County's failure to adequately train its deputies constituted deliberate indifference as a matter of law.
>
> * * *
>
> Mason County's failure to train its officers in the legal limits of the use of force constituted 'deliberate indifference' to the safety of its

> inhabitants as a matter of law.[5] Moreover, there was certainly more than enough evidence presented regarding the inadequacy of training in order to survive Mason County's motion for a directed verdict on the issue of municipal liability.
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> [5]Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim - negligent hiring practices and failure to provide adequate supervision - subjected the County to liability.

Pet. App. A-42-43.

As the full quotation makes clear, the Court of Appeals majority gave this as an alternative ground for its decision not to order a new trial on the municipal liability claims, because of the use of the "reckless disregard" language in the jury instructions. See Point II, above. In this civil case, that question was governed by Fed. R. Civ. Pro. 61, which permits reversal only for instructional error which is "inconsistent with substantial justice."

The Court of Appeals found that the instructions' use of the phrase "reckless disregard," if error, did not meet that standard because the evidence clearly established "deliberate indifference," on which the jury was also instructed. It based that on the following statement from City of Canton v. Harris:

> City policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.
>
> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

City of Canton v. Harris, 489 U.S. at 390 n.10.

The Court of Appeals used this observation as a starting point for a harmless error analysis essentially similar to that recently spelled out in Yates v. Evatt, 59 U.S.L.W. 4509 (U.S., May 28, 1991), asking whether "the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to ... [assure][30] that the verdict resting on that evidence would have been the same in the absence of the [error.]" 59 U.S.L.W. at 4512-3.

The evidence overwhelmingly showed that the county officials here ignored an "obvious" need to train his deputies in the use of force. New deputies were given full patrol responsibilities, on their own, without Academy training or any real police training at all. This

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[30]Since, unlike Yates, this was not a criminal case, there was no need to find any error harmless beyond a reasonable doubt.

was done even where there had been warnings of potential problems from the screening psychologist. It was done with "lateral hires" like Jack Gardner, with clouded histories with other departments. And it continued even after complaints about the deputies' misuse of force or mistreatment of citizens.

This utter failure to train these men before entrusting them with deadly weapons and police powers ignored a need which was not only "obvious," but known. It was done over the protest of the department's own nominal "field training" officers. It violated the provisions of the training manual compiled under a previous sheriff, whose provisions and requirements the Stairs administration honored wholly in the breach. As the testimony showed, "they totally disregarded not only the industry standards, but their own policies and standards, and they sent officers out on

the street to perform police services without any training whatsoever."

Petitioners protest that training would have had no effect on the deputies' outrageous behavior, so that "the requisite connection to training was never made." Petition 20. To the contrary, the evidence here fully sustained Canton's endorsement of the utility of police training. So did plaintiffs' police expert, who testified that Mason County's policies made it "substantially certain that there would be violations of citizens' civil rights by their deputies."

The defendants' training policies were so deficient, and their deputies propensities and actions were so extreme, that any difference between the concepts of "reckless disregard" and "deliberate indifference," as the District Court defined them, pales into insignificance. Once the jury accepted the plaintiffs'

basic contentions, as they must have by their verdict, they necessarily would have found either standard met. That is all the Court of Appeals majority held.

To the extent the Court of Appeals' language may go farther and suggest that a total failure to train before entrusting police officers with deadly force always constitutes deliberate indifference, it is faithful to this Court's teachings in City of Canton. Canton's dicta on this point do not blur the lines of municipal responsibility in this area, as Petitioners claim (Petition 21), but clarify them starkly. The defendants' actions in this case were not even close to those lines.

The Court of Appeals' alternative affirmance of the jury's finding on municipal liability on this ground was not error, and does not call for this Court's review.

CONCLUSION

From the beginning, this case has turned on its facts. The defendants' conduct was so egregious it violated any applicable legal standard. Those standards were correctly applied by the courts below. The Petition for Certiorari should be denied.

Respectfully submitted,

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September 6, 1991.

APPENDIX A

Washington State Statutes Involved

RCW 36.20.010:

General duties

The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his office, he and his deputies:

(1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses ...

RCW 36.28.020:

Powers of deputies, regular and special

Every deputy sheriff shall possess all the power, and may perform any of the duties, prescribed by law to be performed by the sheriff and shall serve or execute, according to law, all process, writs, precepts, and orders, issued by lawful authority.

Persons may also be deputed by the sheriff in writing to do particular acts; including the service of process in civil or criminal cases, and the sheriff shall be responsible on his official bond for their default or misconduct.

RCW 41.14.020:

Terms defined
...

(2) "Appointing power" means the county sheriff who is invested by law with power and authority to select, appoint, or employ any deputy, deputies or other necessary employees subject to civil service;
(3) "Appointment" includes all means of selecting, appointing, or employing any person to any office, place, position, or employment subject to civil service ...

RCW 41.14.130:

Filling vacancies in classified service--Eligibility list--Probation

Whenever a position in the classified service becomes vacant, the appointing power, if it desires to fill the vacancy, shall requisition the commission for the names and addresses of persons eligible for appointment thereto. Before a requisition can be made, the appointing authority shall give employees of the appointing authority who are in layoff status or who have been notified of an intended layoff an opportunity to qualify for any class within the office of the appointing authority. The commission shall certify the names of the three persons highest on the eligible list for the class to which the vacant position has been allocated, who are willing to accept employment. If there is no

appropriate eligible list for the class, the commission shall certify the names of the three persons standing highest on the list held appropriate for such class. If more than one vacancy is to be filled an additional name shall be certified for each additional vacancy. The appointing power shall forthwith appoint a person from those certified to the vacant position.

To enable the appointing power to exercise a greater degree of choice in the filling of positions, no appointment, employment, or promotion in any position in the classified service shall be deemed complete until after the expiration of a period of one year's probationary service, as may be provided in the rules of the civil service commission, during which the appointing power may terminate the employment of the person appointed, if during the performance test thus afforded, upon observation or consideration of the performance of duty, the appointing power deems such person unfit or unsatisfactory for service in the office of county sheriff. Thereupon the appointing power shall again requisition the commission for the names and addresses of persons eligible for appointment in the manner provided by this section and the person appointed in the manner provided by this section shall likewise enter upon said duties for the probationary period, until some person is found who is deemed fit for appointment, employment, or promotion whereupon the appointment, employment, or promotion shall be deemed complete.

APPENDIX B

DEFENDANTS' PROPOSED INSTRUCTION NO. 40

You are instructed that the laws of the State of Washington provide as follows:

The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his office, he and his deputies:

(1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;

(2) Shall defend the county against those who, by riot or otherwise, endanger the public peace or safety;

* * *

(5) Shall attend the sessions of the courts of record held within the county, and obey their lawful orders or directions;

(6) Shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary.

RCW 36.20.010.